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UNITED STATES GENERAL ACCOUNTING OFFICE

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STATEMENT OF

SEYMOUR EFROS

ASSOCIATE GENERAL COUNSEL

PROCUREMENT LAW SECTION

OFFICE OF THE GENERAL COUNSEL

BEFORE

THE SUBCOMMITTEE ON SBA AND SBIC

AUTHORITY, MINORITY ENTERPRISE AND GENERAL

SMALL BUSINESS PROBLEMS

COMMITTEE ON SMALL BUSINESS

UNITED STATES HOUSE OF REPRESENTATIVES

ON

THE RULE OF TWO



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Mr. Chairman and Members of the Subcommittee, you have asked me to describe any inquiries made by any committee of the Congress to the GAO with respect to whether the "rule of two" is in conformity with the Competition in Contracting Act of 1984 (CICA), and the nature of the responses offered by us. As you know, the rule of two refers to the provision in the Federal Acquisition Regulation (FAR) that requires a procurement to be set aside exclusively for small business participation if the contracting officer determines that there is a reasonable expectation that offers will be received from at least two responsible small business concerns, and that award will be made at a reasonable price.

Our consideration of the rule of two occurred in connection with the work of a GAO task force on CICA implementation. We created the task force in response to a joint request in August 1984, from the Chairman and the Ranking Minority Member of the House Committee on Government Operations, and the Chairman and Ranking Minority Member of the Subcommittee on Oversight of Government Management, Senate Committee on Governmental Affairs, to review the implementation of CICA in the FAR and other regulations.

In discussions during October and November, 1984, a number of issues were raised by the staffs of the Committees for consideration by the GAO task force. As a result of these discussions and its own analysis of the regulations, the task force drafted a list of possible issues for review, including whether CICA prohibits use of the rule of two. Subsequently, as our task force was nearing completion of its work in early July, 1985, we advised the staff of the House Committee on Government Operations of our legal conclusion that CICA does not preclude use of the rule of two as a set aside standard. Given our conclusion on this issue, we and the staff agreed that there was no need to include a discussion of the rule of two in our report entitled "Federal Regulations Need to Be Revised to Fully Realize the Purposes of the Competition in Contracting Act of 1984," (subsequently issued August 21, 1985).

The legal question involved was whether section 2732(b)(2) of CICA (41 U.S.C. § 414) precludes use of the rule of two as a standard for small business set-asides. That section provides that the contracting agencies are to increase the use of full and open competition by establishing policies that ensure receipt of a sufficient number of offers so that awards will be made at the lowest reasonable cost. In the House and Senate Conference Committee report on CICA, the conferees stated that this

requirement applies to all procurements, including those made under set-aside programs.

We concluded, however, that section 2732 does not affect the broad discretion of a contracting agency under section 15 of the Small Business Act (15 U.S.C. § 644) to determine when a set-aside is appropriate. In our view, CICA does not change the authority of the agencies under the Small Business Act to set aside a fair proportion of procurements by a standard deemed appropriate, including the rule of two. Section 2732 of CICA and the statement in the conference report merely affirm that an agency is required to seek full and open competition among small businesses once a particular procurement has been set aside.